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In The
Supreme Court Of The United States

October Term, 1953

No. 568

UNITED STATES OF AMERICA,
Petitioner

v.

SANDY PRAYLOU, IN HIS OWN RIGHT AND MARION MOISE, AS GUARDIAN AD LITEM FOR SARAH LOUISE PRAYLOU, MAGGIE PRAYLOU AND EDDIE PRAYLOU; AND EDWARD WALKER.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The Respondents above named submit the following Brief in opposition to the granting of a writ of certiorari in the above styled case.

STATEMENT OF FACTS

In Petitioner's Brief, it is stated:

"That the Government may be held liable under The Tort Claims Act for the negligent act of an employee where there is a crash into a house either with a truck or with an airplane is, of course, freely conceded." (Page 11) * * * "If Respondent had shown and the Court had found negligence, these cases would have been entirely different and recovery would have been proper; the South Carolina absolute liability statute would not preclude recovery for negligence under the common law." (Page 12).

Negligence was an issue in both the *Praylou* and *Walker* cases. Both Complaints alleged that the two separate airplanes were being negligently operated. (R. pp. 2 and 15). This was denied by the Government, (R. 3 and 16), but it offered no evidence to rebut the presumption of negligence established by the falling of the different planes. It was admitted in both cases that the respective airplanes were being operated by employees of the Government on Government business.

In the *Praylou* case, in addition to oral testimony, the Investigation Report made by a Military Board of Inquiry was offered in evidence by Respondent. (Exhibit 7). This showed that the plane took off from Shaw Air Force Base, and after proceeding about 3 miles, attempted to return to its base. Suddenly, after making an unusual noise, the plane plummetted to the ground and exploded. The plane was completely demolished and its occupants instantly killed. This was substantiated by the testimony of David Jenkins, the only witness offered by the Government. (R. 13-14).

In the *Walker* case, Respondent was laying tile on the porch of a house over which planes were constantly flying. He heard an unusual motor sound, looked up and saw a plane flying very low, with engines smoking. The plane was flying in an erratic manner, caught on fire, started diving to

the ground, and exploded, almost striking Respondent. While trying to escape from the burning fragments of the plane, Respondent fell, striking his back on a steel truck body used as a mortar container, thereby injuring his back. Respondent was endeavoring to extricate himself from a sudden perilous situation.

In both cases, the District Judge found that Respondents' damages were caused by the negligent, or wrongful act or omission of a government employee while acting within the scope of his employment, under circumstances where the United States, if a private person, would be liable in accordance with the law of South Carolina where the act or omission occurred. The District Judge also found that Respondents were not guilty of any negligence or contributory negligence. (R. pp. 6 and 18). The Court of Appeals affirmed, (R. 21-26), and the opinion is reported in 208 F. 2nd. 291.

REASONS FOR DENYING THE WRIT

1. *Liability is to be determined by the law of South Carolina:*

The Federal Tort Claims Act (USC 1346(b) and 2674) specifically provides that tort claims against the United States shall be determined under the same circumstances where the United States, if a private person, would be liable in accordance with the law of the place where the act or omission occurred; and in the same manner and to the same extent as a private individual under like circumstances.

The Federal Courts have consistently held in several recent cases that suits for damages arising out of airplane accidents must be determined in accordance with the law of the State where the accident occurred. And in each of

the following airplane cases the United States was held liable.

In *United States* vs. *Gaidys,* (C. A. 10) 194 F. 2nd. 762, plaintiff and wife recovered for property damage and personal injuries caused when a jet plane crashed into their residence located a short distance from Lowry Air Force Base, Colorado.

In *Eastern Air Lines, Inc.,* v. *United States,* (D. C., Del.) 110 F. Supp. 491, plaintiff recovered for damages to an airliner sustained in a collision with an army bomber which occurred in South Carolina.

In *D'Anna* v. *United States,* (C. A. 4) 181 F. 2nd. 335, plaintiff recovered damages when an auxiliary gas tank fell from a naval plane flying over Baltimore, Maryland.

In *Parcell* vs. *United States,* (D. C. W. Va.) 104 F. Supp. 110, plaintiff recovered judgment against the United States when two jet planes flying in formation crashed on his land.

In *Union Trust Co. of Dist. of Cola.* v. *United States,* (D. C. D. C.) 113 F. Supp. 80, plaintiff recovered judgment against the United States for wrongful death of airplane passengers in collision with a military plane while the passenger airliner was attempting to land at Washington National Airport. In this case, it is stated:

> "*** The present climate of public opinion, of which The Federal Tort Claims Act is the most conspicuous example, is to the effect that the fiction of sovereign immunity is for the most part outmoded and as far as it relates to the Act in question, preserved *only in those specific exceptions which Congress has specifically indicated and of which the activity with which we are here concerned is not one.* See generally, *Federal*

Crop Ins. Co. v. *Merrill*, 1947, 332 U.S. 380, 383, 68 S. Ct. 1, 92 L. Ed. 10." (Emphasis added).

2. *South Carolina Airplane Liability Statute Controls*:

The Uniform State Law for Aeronautics was adopted in South Carolina in 1929 (36 Statutes of S. C., 220-222) and is now incorporated in 1952 S. C. Code, Title 2, Secs. 1-12. This Uniform Law has been likewise adopted in whole or in part by a majority of the States. While the validity of this statute has not been questioned, yet the New Jersey statute which is identical with the South Carolina statute has been held constitutional in *Prentiss* v. *National Airlines, Inc.*, 112 F. Supp. 306. In the *Prentiss* case, *Supra*, the opinion states:

> "Furthermore, that absolute liability is recognized today as due process of law, we have on the highest authority. In *Crowell* v. *Benson*, 1932, 285 U. S. 22, 82, 52 S. Ct. 285, 304, 76 L. Ed. 598, the highest court in the land said: 'The power, under proper circumstances, to provide for liability without fault, *** is beyond question.' Similarly, in *New York Central R. Co.* v. *White*, 1917, 243 U.S. 188, 204, 37 S. Ct. 247, 253, 61 L. Ed. 667, the same court said: 'liability without fault is not a novelty in the law. The common law liability of the carrier, of the innkeeper, or him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained.' "

Nor can its applicability to the facts of this case be doubted. The Federal Tort Claims Act is nothing more than a waiver of the Government's immunity. It does not attempt

to limit or define degrees of liability. That problem is left to the various states. As was so tersely stated by Mr. Justice Brandeis in *Erie RR. Co.* v. *Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487:

> "Except in matters governed by The Federal Constitution or by acts of Congress, *the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.*" (Emphasis added).

The Tort Claims Act is couched in quite broad and very sweeping language and must be given a liberal construction. See, *United States* v. *Aetna Casualty & Surety Co.,* 338 U.S. 366, 70 S. Ct. 207, 94 L. Ed. 171; *United States* v. *Yellow Cab Co.,* 340 U.S. 543, 71 S. Ct. 399, 95 L. Ed. 523.

In South Carolina, the ordinary rules of negligence which apply to the operation of airplanes are similar to those which relate to the operation of vehicles. An automobile driver or a pilot in an airplane must use that degree of care which an ordinarily careful person would use as the situation and circumstances demand. See, *Carroll* v. *Lumpkin,* 146 S. C. 178, 143 S.E. 648; *Crouch* v. *Cudd,* 158 S. C. 1, 155 S.E. 136; *Holcombe* v. *W. N. Watson Supply Co.,* 171 S. C. 110, 171 S.E. 604.

While the rule of evidence known as *res ipsa loquitur* is not in force in South Carolina, yet its rejection does not mean that negligence may not be established by circumstantial evidence. The South Carolina Supreme Court has so held in two recent cases: *Eickhoff* v. *Beard-Laney, Inc.,* (1942) 199 S. C. 500, 20 S.E. 2nd. 153, 141 A. L. R. 1010; and *Daniels* v. *Timmons,* (1950) 216 S. C. 539, 59 S.E. 2nd. 149, certiorari denied, 340 U.S. 841. The rule

enunciated in these cases is that "circumstantial evidence is regarded by law as competent to prove any given fact in issue in a civil case and is sometimes as cogent and irresistible as direct and positive testimony. In many instances facts can be proved only by circumstantial evidence." And "the facts and circumstances shown should be reckoned with in the light of ordinary experience and such conclusions deduced therefrom as common sense dictates."

In the cases here, where each of the two different planes crashed to the ground and exploded and inflicted injuries and damages, the falling in each such case, coupled with the further facts that just before falling each made an unusual noise and an erratic flight, is the strongest sort of proof of either negligent operation or defective construction or equipment. In neither case did the Government offer any evidence whatever showing or even tending to show the skill and training of the pilots or the safe and proper construction and maintenance of the respective planes; nor did it attempt to rebut the presumption of negligence in either case. The South Carolina airplane liability statute is really nothing more nor less than the adoption of the doctrine of *res ipsa loquitur* as limited to airplane accidents, because it is generally impossible to establish with any certainty the cause of the falling of an airplane.

3. *Cases Distinguished*:

None of the cases relied on by Petitioner involve accidents caused by falling airplanes. The facts in these several cases clearly show that they have no application to the cases here in question. Each of them can be readily distinguished.

Dalehite v. *United States*, 346 U. S. 15, did not involve any statute of the State of Texas, where the act or omission occurred, defining the liability of a defendant, as is the case

here; and the decision is based upon a specific exception to The Federal Tort Claims Act, to-wit: Section 2680(a), which has no application to the case here. Respondents are not relying on any doctrine of nuisance in this case. Nor do they contend that liability on the part of the United States arises simply because of the ownership of military airplanes, nor because the Government operates Shaw Air Force Base in South Carolina. Respondents' contention is that the South Carolina statute imposes liability for damages caused by a falling airplane and also because the damages resulted from the negligent or wrongful act or omission of the respective pilots of the particular planes in question while acting within the scope of his employment.

In *United States* v. *Inmon,* (C. A. 5) 205 F. 2nd. 681, a boy was injured by the explosion of a blasting cap which he found on private property, which several years prior thereto had been leased for Army training purposes. There was no proof of any particular act or omission on the part of any employee of the Government which might constitute negligence, and the court found that the boy was guilty of contributory negligence barring any recovery.

In *Harris* v. *United States,* (C. A. 10) 205 F. 2nd. 765, the suit was for damages to appellant's cotton and peanut crops resulting from spraying operations conducted by the United States on its adjoining property. The opinion of the Court of Appeals, after reviewing the facts, said:

> "From these findings the Court concluded that the acts of the government complained of constituted the exercise of a discretionary function within the meaning of 28 U. S. C. A., Sec. 2680(a) of The Tort Claims Act, which, inter alia, excludes from the provisions of the Act any claims 'based upon the exercise or performance or the failure to exercise or perform

a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused'.

We can find no valid distinction between the decision to destroy the willows and eradicate the mosquitoes by the use of 2, 4-D sprayed from an airplane and the decision to manufacture, bag, label and ship fertilizer in the *Dalehite* v. *United States case,* 346 U.S. 15, 73 S. Ct. 956. Moreover, if the operational details can be said to be outside the area of discretionary functions, the trial court's finding of non-negligence forecloses liability for any negligent or wrongful act of a government employee."

In this connection, attention is again called to the decision of the Court of Appeals for the Tenth Circuit in *United States* v. *Gaidys, Supra,* where the Government was held liable for damages caused by the falling of a military airplane in Colorado. The *Harris* case does not modify or overrule the doctrine laid down in the *Gaidys* case, and does not even refer to the *Gaidys* case. Hence, the same Court of Appeals has imposed liability under The Tort Claims Act for damages sustained because of the crashing of a military airplane on land of the claimant; but has denied liability where "a discretionary function or duty" was involved, because such acts are specifically exempted from the Act under the provisions of Sec. 2680(a). The distinction between the *Gaidys* case on the one hand and the *Harris* case on the other hand is crystal clear.

In the cases here before this Court, the District Judge found as a fact that each of the airplanes involved was owned by the United States Air Force and that the pilot was acting in his official capacity and within the scope of his office and employment at the time of the accident and that

the damages were caused by his negligent or wrongful act or omission, and that the plaintiffs (respondents) were not guilty of any negligence whatever. (R. pp. 6 and 18). In the *Praylou* case, see also the Stipulation (R. p. 4) and the finding of the Military Board of Inquiry (R. p. 13).

Surely, the authorized flights of two military planes piloted by officers acting within their official duties under military orders, which subsequently crashed and caused the damages complained of, were not such "a discretionary function or duty" so as to bring them within the specific exemption of The Tort Claims Act under the provisions of Section 2680(a). The decisions in both the *Dalehite* and *Harris* cases are based on the exception contained in Section 2680(a); hence those cases are not applicable nor controlling in the cases here in question.

The opinion in *Heale* v. *United States*, (C. A. 3) 207 F. 2nd. 414, is very brief and contains no facts. The judgment against the United States was vacated and the cause remanded "to the end that appropriate findings may be made." The force of this decision is lacking.

CONCLUSION

Under the authorities herein cited and for the reasons above set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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March 5, 1954.